

ARTICLE 2: SALES

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This article is primarily for Ohio practicing attorneys who, after June 30, 1962, will be engaged in sales of personalty transactions under the new Uniform Commercial Code. However, for some period after July 1, 1962, when the Code becomes effective, transactions entered into prior to that date, and the rights, duties and interests flowing from them will or may be determined under statutes or other law amended or repealed by this Code.¹ Thus, the Uniform Sales Act² and other legislation having a bearing on the law of sales³ as well as any common law principles which have been modified or annulled by the Code will, for some time, add to the confusion or, perhaps, consternation produced by a new Code. Confusion there may be for a time, but there is no reason for anyone to be alarmed by the Code, including Article 2 on Sales, for the language for the most part is clear, simple and direct. As in any new approach, new learning is involved and new methods of solving a sales problem must be pursued. But there is little need for loss of sleep except for a careful reading and study of article 2. The 1958 draft (that is, the last draft) is a superbly drawn bit of legislation and this is the draft which has been enacted in Ohio. The present writer, in an article concerning the 1952 "Official Draft," concluded that "the things which are good in this draft are so fine and so many as compared with the things that are mediocre or downright

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¹ 129 v. S5, § 3 which reads: "Transactions validly entered into before such date (July 1, 1962) and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred.

"Instruments, documents, or notices filed prior to July 1, 1962, in accordance with the law at the time of such filings shall be deemed to be filed under section one of this Act as of the original date of filing and may be continued or terminated as provided in section one of this act."

² Ohio Rev. Code §§ 1315.01 to 1315.76.

³ For example: Uniform Bills of Lading Act, Ohio Rev. Code §§ 4965.01 to 4965.49 inclusive, and 4965.99; Uniform Warehouse Receipts Act, Ohio Rev. Code §§ 1323.01-1323.99; Uniform Trust Receipts Act, Ohio Rev. Code §§ 1316.01-1316.31; Ohio provisions concerning chattel mortgages and conditional sales, Ohio Rev. Code §§ 1319.01 to 1319.05 inclusive, and 1319.08 to 1319.99; assignment of accounts receivable provisions, Ohio Rev. Code §§ 1325.01-1325.08; modern factor's lien provisions, Ohio Rev. Code §§ 1311.59-1311.64; bulk sales provisions, Ohio Rev. Code §§ 1313.53-1313.59. The Retail Installment Sales Act (Metzenbaum Act), Ohio Rev. Code §§ 1317.01-1317.11 will remain on the books as provided in the Uniform Commercial Code § 2-102; Ohio Rev. Code § 1302.02.

bad that the Uniform Sales Act can well be replaced by the Uniform Commercial Code provisions on Sales."⁴ This latest, and final draft has cured a number of sections from ambiguities and uncertainties due to awkward draftsmanship and, in some cases, policy matters were rectified due to intervening criticism.

In accordance with the purpose of this Symposium, I shall attempt "to draw a broad picture for the practicing Ohio attorney, giving detail and reference sources where helpful." I shall not, as the directions instruct, "undertake to explain every conceivable detail . . . but (shall) concentrate on the overall effect that this act can be expected to have in the day-to-day practice of the Ohio attorney."

WHAT CONTRACT PRINCIPLES ARE DISTURBED OR CLARIFIED?

An offer by a merchant to buy or sell goods which, through a signed writing, gives assurance that it will be held open is not revocable for lack of consideration during the time stated, or for a reasonable time if none is stated, "but in no event may such period of irrevocability exceed three months." However, if a form stating a term of assurance is furnished by the offeree, it must be separately signed by the offeror.⁵ This corresponds with the intent of merchants in such cases, and a handwritten memorandum on the letterhead of the writer confirming a firm offer already made would satisfy this section although not subscribed.⁶ Likewise, a telegram, the original draft of which contained an authorized typewritten signature.⁷ However, if the offer is to be open for more than three months, it must be based on a consideration to be enforceable beyond three months.⁸ The signature may be any symbol executed or adopted by a party with the intent to authenticate the writing.⁹

An acceptance of an offer, unless definitely indicated by its language or the circumstances, must be construed as inviting acceptance "in any manner and by any medium reasonable in the circumstances."¹⁰ An order or offer to buy goods for prompt shipment

⁴ "The Law of Sales in the Uniform Commercial Code," 15 Ohio St. L.J. 12, at 23 (1954).

⁵ Ohio Rev. Code § 1302.08 (UCC § 2-205). This changes the Ohio rule that consideration must be present to make an offer binding. Throughout Article 2, merchants are treated as professionals should be and thus distinctions are made between them and non-professionals. The term "merchant" is defined in Ohio Rev. Code § 1302.01 (A)(5) (UCC § 2-104(1)).

⁶ Comment 2 to UCC § 2-205.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Ohio Rev. Code § 1301.01(MM) (UCC § 1-201(39)).

¹⁰ Ohio Rev. Code § 1302.09(A)(1) (UCC § 2-206). This is in accord with *Berwold Stewart Co. v. Mitchell*, 37 Ohio App. 121, 174 N.E. 148 (1938), as to the manner and medium of acceptance.

can be accepted either by a prompt promise to ship or by prompt shipment of conforming *or non-conforming goods*; but a shipment of non-conforming goods is not an acceptance if the seller notifies the buyer seasonably that such shipment is merely an accommodation to the buyer.¹¹ This provision concerning non-conforming goods has the effect of allowing the seller to ship such goods as an accommodation to the buyer without being liable to the buyer for breach of contract, provided he notifies the buyer of the fact of accommodation. The buyer may reject the non-conforming goods, or he may accept them as if his offer had been for such goods, or he may dicker with the seller for different terms if he desires.

Technical rules of acceptance (*e.g.*, telegraphic offers to be accepted by telegraphic acceptance and the like) are rejected and any reasonable manner of acceptance, unless the offeror makes clear that this will not do, will suffice.

What if additional terms or different ones are set forth in an acceptance or written confirmation? Even though additional terms or ones different from those offered or agreed upon are included, "unless acceptance is expressly made conditional on assent to the additional or different terms," this may be an acceptance.¹² The additional terms are considered as proposals to be added to the contract; but *between merchants*, these terms become a part of the contract unless acceptance is expressly limited to the terms of the offer,¹³ or unless the additional terms materially alter the offer, or unless there has been notice of objection to such additional terms or such notice is given within a reasonable time after notice of them has been received.¹⁴

And if the writings of the parties do not establish a contract, the conduct of both parties recognizing its existence is sufficient to establish a contract of sale. The terms of such contract are those on which the writings of the parties agree, with any "supplementary terms" incorporated by other provisions of the Code.¹⁵

As to the meaning of the contract of sale, a course of performance, where the contract involves repeated occasions of performance and opportunities to object, without objecting, is relevant. Such a course of performance or of dealing and any usage of trade and the express terms of the agreement are to be construed as consistent with each other whenever reasonable. But when such construction is unreason-

¹¹ Ohio Rev. Code § 1302.09(A)(2) (UCC § 2-206(b)). Ohio law agrees as to conforming goods, *Dayton Co. v. Coy*, 13 Ohio St. 84 (1862).

¹² Ohio Rev. Code § 1302.10(A) (UCC § 2-207(1)).

¹³ See Comments 4 and 5 to UCC § 2-207 on this matter where examples are given.

¹⁴ Ohio Rev. Code § 1302.10(B) (UCC § 2-207(2)).

¹⁵ Ohio Rev. Code § 1302.10(C) (UCC § 2-207(3)).

able, the express terms control the course of performance, and the course of performance controls both a course of dealing and usage of trade.¹⁶ Repeated occasions of performance without objection indicate more clearly than words what the parties understand to be the meaning of their agreement.

A contract within the sales article may be modified by agreement and be binding though not supported by consideration, but such an agreement requires compliance with the Statute of Frauds section¹⁷ if the contract as modified comes within its provisions.¹⁸

A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.¹⁹

Although an attempted modification or rescission does not meet the requirements of the above quoted subsection or of the Statute of Frauds, it can, nevertheless, operate as a waiver.²⁰ But one who has waived an executory portion of the contract may retract such waiver by reasonable notice to the other party that strict performance will thereafter be required of any term waived, unless the retraction, due to a material change of position in reliance on the waiver, would be unjust.²¹ It should be added that modifications made under this section must meet the good faith test²² imposed on the whole act. And as the Comment to this section states:

The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.²³

Contracts or any clause within them found to be unconscionable at the time the contract was made may be refused enforcement by a court, and the court may, if it desires, enforce the remainder of the

¹⁶ Ohio Rev. Code § 1302.11(A) and (B) (UCC § 2-208(1) and (2)).

¹⁷ Ohio Rev. Code § 1302.04 (UCC § 2-201).

¹⁸ Ohio Rev. Code § 1302.12(A) and (C) (UCC § 2-209(1) and (3)).

¹⁹ Ohio Rev. Code § 1302.12(B) (UCC § 2-209(2)).

²⁰ Ohio Rev. Code § 1302.12(D) (UCC § 2-209(4)).

²¹ Ohio Rev. Code § 1302.12(E) (UCC § 2-209(5)). As to waiver, Ohio Rev. Code § 1301.07 (UCC § 1-107) provides: "Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party."

²² Ohio Rev. Code § 1301.09 (UCC § 1-203) which reads: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

²³ Comment 2 to UCC § 2-209.

contract without the unconscionable clause, or may so limit its application as to avoid an unconscionable result.²⁴ The parties are afforded an opportunity in such cases to present evidence of the contract's commercial setting, purpose and effect to aid the court in its determination.²⁵ No longer will a court have to wrestle with indirect methods of reaching desirable, conscionable results through the manipulation of language, or of the rules of offer and acceptance, or by determinations that the clause or contract is not in accord with public policy. "This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability."²⁶ But barring some claim of unconscionability, where the sales article allocates a risk or burden as between the parties "unless otherwise agreed," the agreement may not only shift the allocation but may also divide the risk or burden.²⁷

The price may be payable in money "or otherwise," thus making obsolete some law which held there was no sale, and thus no warranty, when goods were transferred for services rendered. The price may be paid in whole or in part in goods, that is, by barter, and each party is a seller of the goods he thus transfers. The price may also be payable in an interest in realty which was not true under the Uniform Sales Act, but the transfer of the realty would have to be made in the locally approved fashion.²⁸

Open price terms are specifically approved in the sales article and if the parties conclude a contract without settling the price, the price is a reasonable price at the time for delivery, if nothing was said as to the price, or if the price was left to be agreed upon by the parties and they failed to agree, or the price was fixed on the basis of some agreed market or other standard as set by a third person or agency and it was not so set or recorded.²⁹ This should settle difficulties formerly apparent prior to the clear statement in this section. Of course, when the price is to be fixed by the buyer or the seller, good faith in fixing it is the criterion. And if the price left to be fixed other than by agreement of the parties fails because of the fault of one party, the other is given the option of treating the contract as "cancelled,"³⁰

²⁴ Ohio Rev. Code § 1302.15(A) (UCC § 2-302(1)).

²⁵ Ohio Rev. Code § 1302.15(B) (UCC § 2-302(2)). See the several cases cited in Comment 1 to UCC § 2-302 illustrating the underlying basis of this broadly stated section.

²⁶ See Comment 1, UCC § 2-302.

²⁷ Ohio Rev. Code § 1302.16 (UCC § 2-303).

²⁸ Ohio Rev. Code § 1302.17 (UCC § 2-304).

²⁹ Ohio Rev. Code § 1302.18(A) (UCC § 2-305(1)).

³⁰ Ohio Rev. Code § 1302.01(A)(14) (UCC § 2-106(4)): "'Cancellation' occurs

or may himself fix a reasonable price.³¹ However, the parties can settle this whole matter by their contract by showing that they intend not to be bound unless the price is fixed in the manner agreed upon. In such a case, if the buyer has received any goods he must return them and, if unable to do so, must pay their reasonable value at the time of delivery, and the seller must return what has been paid on account.³²

As to the time and place of payment, these are figured at the point where the buyer is to receive the goods though the place of shipment is the place of delivery.³³ A seller authorized to ship the goods may ship them under reservation and may tender documents of title, but the buyer may inspect the goods after their arrival prior to payment unless this right is inconsistent with the contract terms as, for example, under a C.O.D. arrangement or a sale on C.I.F. terms or the like.³⁴ But if the agreement authorizes delivery and it is to be made by way of documents of title other than as stated in the sentence above—that is, by negotiable bills of lading, for example—then payment is due at the time and place at which the buyer is to receive the documents.³⁵ As to shipment required or authorized to be on credit, the credit period runs from the time of shipment, “but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.”³⁶ But these various rules may be “otherwise agreed” upon with the usual requirement of good faith and of agreeing in a not unconscionable way.

A purchase and sale based upon the seller's output or the buyer's requirements is spelled out to mean the output or requirements occurring in good faith, with the proviso that no quantity unreasonably disproportionate to a stated estimate may be tendered or demanded, and that if no estimate has been stated there may not be tendered or

when either party puts an end to the contract for breach by the other and its effect is the same as ‘termination’ except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.”

Under Ohio Rev. Code § 1302.01(A)(13) (UCC § 2-106(3)), “‘Termination’ occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On ‘termination’ all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.” On agreements dispensing with notification on termination which are unconscionable, see Ohio Rev. Code § 1302.22(C) (UCC § 2-309(3)).

³¹ Ohio Rev. Code § 1302.18(B) and (C) (UCC § 2-305(2) and (3)).

³² Ohio Rev. Code § 1302.18(D) (UCC § 2-305(4)).

³³ Ohio Rev. Code § 1302.23(A) (UCC § 2-310(a)).

³⁴ Ohio Rev. Code § 1302.23(B) (UCC § 2-310(b)). As to buyer's right to inspect, see Ohio Rev. Code § 1302.57 (UCC § 2-513).

³⁵ Ohio Rev. Code § 1302.23(C) (UCC § 2-310(c)).

³⁶ Ohio Rev. Code § 1302.23(D) (UCC § 2-310(d)).

demanded a quantity unreasonably disproportionate to any normal or otherwise comparable prior output or requirements.³⁷ This takes care of a previously troublesome problem through the adoption of reasonable limitations.

In the somewhat similar agreement for exclusive dealing, the statute imposes an obligation, unless otherwise agreed, of the use of the respective parties' best efforts to supply the goods and to promote their sale.³⁸

Somewhat comparable to the provisions concerning open price terms are those pertaining to agreements leaving particulars of performance to be specified by one of the parties. Such agreements, if otherwise sufficiently definite to constitute contracts of sale, are valid provided the specification is made in good faith and with commercial reasonableness.³⁹ Unless otherwise agreed, specifications concerning the assortment of goods are at the buyer's option; those pertaining to shipment, with some exceptions, are at the seller's option.⁴⁰ Provisions are made in case of the failure of a party to make seasonable performance or to cooperate where this is necessary to the performance of the other by excusing the party not at fault in case of delay in his own performance due to such default, and by providing that he may either proceed in any reasonable manner to perform or treat the other's failure to specify or to cooperate as a breach by his failure to deliver or accept the goods, a time limitation being placed upon this latter option.⁴¹

The provisions for delegation of performance and the assignment of rights seem not to make material changes in previous Ohio law. It should be noted, however, that a prohibition of assignment of "the contract," barring circumstances pointing to the contrary, must be construed as barring only the delegation to the assignee of the assignor's performance.⁴² And "A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise."⁴³ But, apart from this limitation, the parties can agree against an assignment.⁴⁴ Where there is a valid assignment delegating performance, protection is given the other party by permitting him to treat this as

³⁷ Ohio Rev. Code § 1302.19(A) (UCC § 2-306(1)).

³⁸ Ohio Rev. Code § 1302.19(B) (UCC § 2-306(2)).

³⁹ Ohio Rev. Code § 1302.24(A) (UCC § 2-311(1)).

⁴⁰ Ohio Rev. Code § 1302.24(B) (UCC § 2-311(2)).

⁴¹ Ohio Rev. Code § 1302.24(C) (UCC § 2-311(3)).

⁴² Ohio Rev. Code § 1302.13(C) (UCC § 2-210(3)).

⁴³ Ohio Rev. Code § 1302.13(B) (UCC § 2-210(2)).

⁴⁴ See "unless otherwise agreed" provisions in Ohio Rev. Code § 1302.13(A) and (B) (UCC § 2-210(1) and (2)).

creating "reasonable grounds for insecurity" so that he may, under another section of the sales article, demand assurances from the assignee.⁴⁵ This would seem to be a particularly effective provision in case of an assignment of the output or requirements type of transaction.

TRANSACTIONS IN GOODS UNDER THIS ARTICLE

"Unless the context otherwise requires, sections 1302.01 to 1302.98, inclusive, of the Revised Code, apply to transactions in goods; they do not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor do sections 1302.01 to 1302.98, inclusive, of the Revised Code impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers."⁴⁶

The term "goods" is defined as including all things (including goods specially manufactured) which are *movable* at the time of identification to the contract other than money in which the price is to be paid, investment securities and things in action.⁴⁷ Within this description are the unborn young of animals, growing crops, and other identified things attached to realty as limited by another section. A *present sale* of standing timber, or of minerals, or of structures or their materials (other than fixtures) to be removed from the realty cannot be made except through a real estate conveyance.⁴⁸ This, of course, is contrary to the provision of the Uniform Sales Act which defines goods as including "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."⁴⁹ However, under this new statute, a *contract* for the sale of standing timber, minerals or structures calling for severance or removal *by the seller* is a contract for the sale of goods and need not qualify as a contract for the sale of an interest in the land.⁵⁰ But notice, particularly, that the contract to sever must be by the seller. If the buyer is to sever, the Statute of Frauds *re* realty and the land recording provisions apply. When severance occurs they are "movables" title to which can be presently transferred if the parties so intend.

As to growing crops or other things attached to the soil which may be removed without material harm thereto, other than those real

⁴⁵ Ohio Rev. Code §§ 1302.13(E) and 1302.67 (UCC § 2-210(5) and § 2-609).

⁴⁶ Ohio Rev. Code § 1302.02 (UCC § 2-102). Secured transactions of the type excepted are provided for in Article 9 of the UCC; Ohio Rev. Code §§ 1309.01-1309.50.

⁴⁷ Ohio Rev. Code § 1302.01(A) (UCC § 2-105(1)). Ohio Rev. Code §§ 1308.01 to 1308.36 cover the subject of investment securities which is Article 8 of the UCC. This article is comparable to a negotiable instruments law relating to securities.

⁴⁸ Ohio Rev. Code § 1302.03(A) (UCC § 2-107(1)).

⁴⁹ Ohio Rev. Code § 1315.01(J); Uniform Sales Act § 76(1) defining "goods."

⁵⁰ Ohio Rev. Code § 1302.03(A) (UCC § 2-107(1)).

property interests described above, there may be a contract of sale apart from the land whether the seller or buyer is to do the severing and the parties can by "identification" effect a present sale prior to severance.⁵¹ There is no requirement that such crops be industrial growing crops as distinguished from those usually described as *fructus naturales*, and the confusion caused by such a distinction has now been removed. One can identify the crop as that sowed or growing on Blackacre or those specified to be sowed or growing upon certain acres described in the contract. In order to protect against third-party rights which may be acquired after a contract of this type has been entered into, the statute permits such contracts of sale to be executed and recorded as documents transferring interests in land, and this constitutes notice of the buyer's rights under the sale.⁵² The "special property and insurable interest" which the buyer acquires upon identification occurs, in the absence of explicit agreement,

when the crops are planted or otherwise become growing crops
... if the contract is ... for the sale of crops to be harvested
within twelve months or the next normal harvest season after contracting whichever is longer.⁵³

The same is true of the sale of the young of animals to be produced from animals possessed and described, the special property and insurable interest coming to the buyer when the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting;⁵⁴ again, in the absence of explicit agreement otherwise. As we shall presently see, this special property interest which is acquired by identification may be important in certain circumstances.

Things attached to the realty which may be removed without material harm thereto are the sort of things which lawyers have been accustomed to call "fixtures." The Code for the most part advisedly avoids the use of this term which has come to mean diverse things.⁵⁵

⁵¹ Ohio Rev. Code § 1302.03(B) (UCC § 2-107(2)). As to what constitutes identification see discussion *infra*, pp. 199-201.

⁵² Ohio Rev. Code § 1302.03(C) (UCC § 2-107(3)).

⁵³ Ohio Rev. Code § 1302.45(A) (UCC § 2-501(c)).

⁵⁴ *Ibid.*

⁵⁵ But see Ohio Rev. Code § 1309.32 (UCC § 9-313) on Priority of Security Interests, in Fixtures, where this term is used. But Comment to UCC § 2-105 (Ohio Rev. Code § 1302.01) states:

The use of the word "fixtures" is avoided in view of the diversity of definitions of that term. This Article [Sales] in including within its scope "things attached to realty" adds the further test that they must be capable of severance without material harm thereto. As between the parties any identified things which fall within that definition become 'goods' upon the making of the contract for sale.

And see also Comment 2 to UCC § 2-107.

The law of Ohio other than this particular legislation determines whether and when goods become fixtures. And this particular legislation does not prevent encumbrances on fixtures created by the law applicable to real estate.⁵⁶ But with the provision for the recording of such contracts as documents transferring an interest in land, a desirable safeguard is furnished a purchaser of such goods.⁵⁷

The Sales Article does not purport to deal with things "not fairly identifiable as movables before the contract is performed."⁵⁸ However, "movables" include growing crops, growing fruit, perennial hay, nursery stock, and "fixtures," the young of animals where identification can be made upon conception, and foreign currency, that is, currency other than money in which the price is to be paid.⁵⁹ And a wool crop to be produced by a described flock of sheep would also come within the description.

THE STATUTE OF FRAUDS

Except in the special cases discussed immediately below, a contract for the sale of goods for the price of \$500 or over to be enforceable by action or defense must be in a writing indicating that a contract of sale has been made between the parties and must be signed by the party against whom enforcement is sought or by his authorized agent. The fact that the writing omits a term agreed upon or erroneously states a term does not make the writing insufficient, but it is not enforceable beyond the quantity of goods shown in the writing. As the Comment states, "All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. . . . The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted."⁶⁰ And if a contract does not satisfy the requirements stated above but is valid in other respects, it is enforceable if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, prior to his receipt of notice of repudiation, has made a substantial beginning of their manufacture or made commitments

⁵⁶ Ohio Rev. Code § 1309.32 (UCC § 9-313).

⁵⁷ Ohio Rev. Code § 1302.03(C) (UCC § 2-107(3)).

⁵⁸ Comment 1 to UCC § 2-105.

⁵⁹ *Ibid.*

⁶⁰ Ohio Rev. Code § 1302.04(A) (UCC § 2-201(1)) and Comment 1.

Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be 'signed', a word which includes any authentication, which identifies the party to be charged; and third, it must specify a quantity.

for their procurement.⁶¹ Likewise, if the defaulting party admits in his pleading, or in his testimony, "or otherwise in court that a contract of sale was made," the contract may be enforced but, again, not beyond the quantity of goods admitted.⁶² Furthermore, partial performance by receipt and acceptance of the goods or of the price is a clear admission by both parties that a contract actually exists.⁶³ This is a considerable change from the Uniform Sales Act Statute of Frauds and it should be noted that the \$2,500 provision in the Ohio version of the Uniform Sales Act provision has been stepped down to \$500 in the new Code.

There is also a provision having reference to transactions between merchants. Where such professionals are involved, a contract, if made within a reasonable time and if it is sufficient as against the sender, the merchant receiving it having reason to know its contents, satisfies the specific formal requirements against the recipient "unless written notice of objection to its contents is given within ten days after it is received."⁶⁴ Thus, failure to reply to a written confirmation within ten days of its receipt amounts to a writing under this subsection and is sufficient as to both parties without compliance with the specific formal requirements set out in the first subsection.⁶⁵ But, as the Comment to this section points out: "The only effect . . . is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected."⁶⁶

Section 17 of the Statute of 29 Charles II upon which Section 4 of the Uniform Sales Act⁶⁷ was based has frequently been described as a Statute of Frauds which encouraged, rather than prevented frauds in contracts for the sale of goods. The new Statute of Frauds in the sales article has broken from a long tradition and, while there will no doubt be problems which will require an airing in court, the simplicity and definiteness of statement should aid greatly in the determination of whether the particular contract is enforceable and to what extent.⁶⁸

⁶¹ Ohio Rev. Code § 1302.04(C)(1) (UCC § 2-201(3)(a)).

⁶² Ohio Rev. Code § 1302.04(C)(2) (UCC § 2-201(3)(b)).

⁶³ Ohio Rev. Code § 1302.04(C)(3) (UCC § 2-201(3)(c)).

⁶⁴ Ohio Rev. Code § 1302.04(B) (UCC § 2-201(2)).

⁶⁵ Comment 3 to UCC § 2-201(2) (§ 1302.04(B)).

⁶⁶ *Ibid.*

⁶⁷ Ohio Rev. Code § 1315.05.

⁶⁸ Other Statutes of Frauds in the Uniform Commercial Code are: § 1-206 (for kinds of personal property not otherwise covered—\$5,000 provision—such as the sale of bilateral contracts, royalty rights and similar things—See Comment to this section (Ohio Rev. Code § 1301.12); § 8-319 pertaining to contracts for the sale of securities—no

No longer will it be possible, when one is sued on a contract for the sale of goods, to plead in any manner which carries with it an admission of an oral contract, for example, but denying that it is enforceable for non-compliance with the Statute of Frauds. And if the defendant testifies when there is an oral contract coming within the Statute of Frauds, will he not be in jeopardy of perjury if he intentionally denies making the oral contract? How should he plead in the first instance in such a case?

THE MATTER OF TITLE

At common law and under the Uniform Sales Act many problems were decided upon the finding of title in the buyer either because of the actual intent of the parties or by virtue of presumptions raised as to the probable intent when none was actually shown.⁶⁹ It did not matter whether the problem concerned the narrow question of risk of loss of or damage to the goods, or whether the price was payable, or whether the goods were covered by insurance of one or the other party, or whether the problem was one of whose goods these were for taxing purposes, or whether the buyer's or seller's attaching creditors had rights in the goods, or whether a purchaser from one or the other party obtained a good title. The lump title concept was brought into play to aid in the decision of numerous problems much narrower in their scope than the full bundle of rights within the concept of "title." The present writer has often contended that the title ascertaining procedure was an indirect way of working into the chattel transaction area specific performance without calling it that. The remedy at law is adequate in numerous cases decided in this manner without forcing the buyer to pay the price and accept the goods.

Under the new Code, title is the last thing one looks for in the determination of an answer to a problem.⁷⁰ Were the goods injured or destroyed? If so, one looks for provisions concerning risk of loss.⁷¹ And, having found two sections specifically referring to this matter,

dollar price figure is mentioned—and this section approaches in similarity the § 2-201 provision just discussed (Ohio Rev. Code § 1308.30); and § 9-203 pertaining to formal requirements in security (secured transactions) agreements (Ohio Rev. Code § 1309.14).

⁶⁹ Uniform Sales Act, §§ 18 and 19; Ohio Rev. Code §§ 1315.19 and 1315.20.

⁷⁰ Ohio Rev. Code § 1302.42 (UCC § 2-401) which is the section referring to title but stating:

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies in respect of title except where the provision refers to such title.

⁷¹ Ohio Rev. Code § 1302.53 (UCC § 2-509) pertaining to risk of loss in the absence of breach, and Ohio Rev. Code § 1302.54 (UCC § 2-510) having reference to breach on risk of loss. And see Ohio Rev. Code § 1302.71 (UCC § 2-613) on casualty to identified goods.

one finds that the problem is narrowed even more—was there a breach of contract prior to the loss or not? If no breach has occurred, then one section spells out the risk of loss answer and it should be noted that, if the factual situation does not come within two subsections, the third one places the risk of loss upon the buyer on his receipt of the goods *if the seller is a merchant*; if not a merchant, the risk passes to the buyer on *tender* of delivery.⁷²

If the problem is one involving the rights of the seller's creditors against sold goods, one seeks the specific provisions on this matter, and finds them.⁷³ Or, if the problem concerns the power of a purchaser to transfer title to a subpurchaser under various factual circumstances, one finds such a section and examines it for an answer.⁷⁴ And one finds a long needed proper solution to the problem of a buyer who in a cash sale has given a check that is not honored because of insufficient or no funds, or where goods have been delivered on a cash sale but payment was not concurrently made, or where the cash buyer has transferred the goods to a purchaser from him. The act specifically states that the cash buyer has this power to transfer.⁷⁵ Thus, the bona fide purchaser from the cash buyer obtains a remedy which, up to this time, has generally been denied him unless there was an estoppel argument available. And even though delivery (as distinguished from title obtained by fraud) was procured through fraud constituting larceny by trick, the fraudulent possessor has the power to transfer better title than he has which would be none at all under these circumstances.⁷⁶ This, however, must be a delivery under a transaction of purchase.

But one finds in the same section another new rule of law which provides that "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."⁷⁷ This makes obsolete the previous law of entrusting a chattel for repair (your watch, for example) to a dealer who deals in such articles as well as repairs them, the previous law permitting the true owner to recover the watch when the dealer wrongfully sold it to a bona fide purchaser. The bona fide purchaser under the new legislation is, in

⁷² Ohio Rev. Code § 1302.53(C) (UCC § 2-509(3)).

⁷³ Ohio Rev. Code § 1302.43 (UCC § 2-402).

⁷⁴ Ohio Rev. Code § 1302.44 (UCC § 2-403).

⁷⁵ Ohio Rev. Code § 1302.44(A)(2) and (3) (UCC § 2-403(1)(b) and (c)).

⁷⁶ Ohio Rev. Code § 1302.44(A)(4) (UCC § 2-403(1)(d)).

⁷⁷ Ohio Rev. Code § 1302.44(B) and (C) which states that such an entrusting or acquiescence in retention of possession produced by larcenous methods qualifies under subsection B quoted in the text above; UCC § 2-403(2) and (3). "Buyer in ordinary course of business" is defined in Ohio Rev. Code § 1301.01(I) (UCC § 1-201(9)).

several circumstances, in a much better position than he was under the common law and the Uniform Sales Act.

Or take the case where the owner of goods has placed them in the hands of another on consignment to be sold by the consignee for the consignor. Suppose these goods are attached by creditors of the consignee or the consignee is thrown into bankruptcy. One finds in this new statute a section which states that if goods are delivered to a person for sale and that person maintains a place of business at which he deals in goods of the kind delivered and operates under a name other than that of the person making the delivery, then this "consignment sale" is considered a "sale or return" and in such a case the creditors and trustee will win. And it makes no difference that the agreement purported to reserve title in the person making delivery or that the agreement stated the goods were "on consignment" or "on memorandum."⁷⁸ If this kind of transaction is desired, the owner should comply with the filing provisions of the secured transactions article. Or, if an applicable law provides for a consignor's interest to be evidenced by a sign, the result stated above will not come about; nor if the consignor is able to prove that the consignee is a person generally known to his creditors "to be substantially engaged in selling the goods of others."⁷⁹

These few examples illustrate the manner of approach under this new statute. One hunts for the solution through a specific statement on the problem at hand and, if none is found, it is then time to consult the title section.⁸⁰ There may be other statutes using the term "sale" or having reference to title that either point to this title section as being pertinent in making a determination or which, though they do not point to it, are deemed sufficiently close to warrant using it as an interpretive device. But, in so far as sales problems are concerned, the warning of the first sentence in the section makes clear the philosophy concerning title. It reads:

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title.⁸¹

⁷⁸ Ohio Rev. Code § 1302.39(C) (UCC § 2-326(3)). That goods on sale or return, while in the buyer's possession, are subject to the claims of the buyer's creditors, see Ohio Rev. Code § 1302.39(B) (UCC § 2-326(2)).

⁷⁹ *Ibid.*

⁸⁰ Ohio Rev. Code § 1302.42 (UCC § 2-401) referring to passing of title; reservation for security; limited application of this section.

⁸¹ *Ibid.*

And the last subsection of this section, as if to illustrate the point so clearly made, reads:

A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."⁸²

THE IMPORTANCE OF IDENTIFICATION

There can be no present sale of goods until they are identified—obviously, for there is nothing to which title can be transferred prior to their identification. The term itself is different from the term "appropriation" in the Uniform Sales Act, that term meaning an identification of conforming goods by one party with the consent of the other upon the happening of which title passes to the buyer. Under the new Act the parties can have an explicit agreement concerning identification, but if they do not, identification occurs to goods already existing and identified when the contract is made. As to a contract of sale of future goods, identification (when not explicitly agreed upon) occurs when goods are shipped, marked or otherwise identified by the seller as goods to which the contract refers, except that in case of crops to be grown or the sale of unborn animals identification occurs when the crops are planted "or otherwise become growing crops" if for the sale of crops to be harvested within twelve months "or the next normal harvest season after contracting whichever is longer," or for the sale of unborn animals upon conception if the animal is to be born within twelve months after contracting.⁸³ The descriptive term "next normal harvest season" would include nursery stock but would not include a "crop" of timber as the concept of a harvest season would be an inappropriate description of such a "crop."⁸⁴

As we have already seen, title is of relative unimportance in solving a problem under the Uniform Commercial Code. Identification of goods to the contract, however, does have importance. When the seller identifies conforming goods to the contract, and even when he identifies non-conforming goods to it, the buyer obtains a "special property and an insurable interest" in such goods; the seller, as long as he has title or a security interest in such goods, retains an insurable interest.⁸⁵ To a buyer who has paid a part or all of the purchase price to goods in which he has this special property (that is, through goods identified to the contract), the buyer may tender the remainder of the

⁸² Ohio Rev. Code § 1302.42(D) (UCC § 2-401(4)).

⁸³ Ohio Rev. Code § 1302.45(A)(2) and (3) (UCC § 2-501(1)(b) and (c)).

⁸⁴ Comment 6 to UCC § 2-501.

⁸⁵ Ohio Rev. Code § 1302.45(A) and (B) (UCC § 2-501(1) and (2)).

purchase price and recover the goods from the seller if the seller becomes insolvent within ten days after he has received the first installment of the price.⁸⁶ A reciprocal right is given the seller who has delivered goods to his buyer on credit while insolvent if he demands them back within ten days after their receipt.⁸⁷ To this extent, one man's goods or his cash do not go to pay another man's debts.

But there would seem to be other significance to the special property right a buyer obtains by identification. Where the seller fails to deliver such identified goods, the buyer may, in a proper case, have specific performance where the goods are unique "or in other proper circumstances."⁸⁸ This latter clause gives considerable leeway to a court to go beyond the narrow interpretations under the common law or the Uniform Sales Act usually occurring in specific performance cases which involve personalty. Output and requirement contracts would make their proper claim to recognition as would any case where the buyer found himself unable to "cover."⁸⁹ Furthermore, the legal remedy of replevin is specifically given the buyer for goods identified to the contract if reasonable effort on his part has resulted in failure to effect cover or if there is reasonable indication that such effort will be unavailing. And, if the goods have been shipped under reservation, the buyer by paying or tendering the amount secured may maintain replevin.⁹⁰ But, where a negotiable document of title is outstanding, the buyer's right would be to replevy this rather than to proceed directly against the goods.⁹¹

Even where the buyer has repudiated his contract, the seller may identify conforming goods to the contract although not identified at the time he learned of the breach, if such goods are in his possession or control. This may be done whether or not the goods are resalable. He may also "treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished."⁹² Where goods are unfinished, the aggrieved seller exercising "reasonable commercial judgment" may finish them

⁸⁶ Ohio Rev. Code § 1302.46(A) (UCC § 2-502(1)).

⁸⁷ Ohio Rev. Code § 1302.76(B) (UCC § 2-702(2)). But if written misrepresentation of solvency has been made "to the particular creditor" within three months before delivery of the goods, the ten days limitation does not apply. But the seller's rights may be defeated by his creditors and by subsequent dealings by the buyer with third persons. See Ohio Rev. Code § 1302.76(C) (UCC § 2-702(3)).

⁸⁸ Ohio Rev. Code § 1302.90(A) (UCC § 2-716(1)).

⁸⁹ See Comment 2 to UCC § 2-716.

⁹⁰ Ohio Rev. Code § 1302.90(C) (UCC § 2-716(3)).

⁹¹ Comment 5 to UCC § 2-716. And see Ohio Rev. Code § 1307.39 (UCC § 7-602) on attachment of goods covered by a negotiable document.

⁹² Ohio Rev. Code § 1302.78(A)(1) and (2) (UCC § 2-704(1)(a) and (b)).

to avoid loss or realize effectively on the goods and identify them to the contract; or he may cease manufacture and resell for scrap or proceed in any other reasonable manner.⁹³ Thus, the goods are made available for resale which is the seller's primary remedy to establish his damages under the Code and, where this is impracticable, that is, if the goods so identified to the contract cannot, after reasonable effort, be resold or the circumstances indicate that an effort to resell will be fruitless, the seller may have his action for the price thus, in a real sense, producing specific performance in a roundabout way.⁹⁴

There is another point at which identification may be of importance. If a contract requires for its performance the very goods which are identified when the contract is made and the goods are injured or destroyed without the fault of the seller prior to the passing of risk to the buyer, the contract is avoided if there is total loss; and if the loss is partial, or if the goods have deteriorated to the point where they no longer conform to the contract, the buyer is given the option of avoiding the contract or of accepting the goods with allowance from the contract price for the shortage in quantity or the deterioration.⁹⁵ But the buyer is given no further right against his seller. This is a case of the sale of specific goods and, in such cases, no other goods would fit the particular contract. This provision avoids the always controversial question raised under Section 7(b) of the Uniform Sales Act⁹⁶ of whether the sale was indivisible or divisible. If indivisible, the buyer under that Act became liable to pay the entire agreed upon purchase price. The new provision makes for an equitable adjustment. It applies where the goods, without the knowledge of the parties, have been destroyed or injured prior to entering into the contract of sale and also when the goods have been injured or destroyed subsequently but prior to the passing of the risk of loss to the buyer. But, of course, if the risk of loss has passed to the buyer prior to the casualty, the buyer must stand such loss.⁹⁷

MATTERS OF WARRANTY

Except where a warranty of title is excluded or modified by specific language or by circumstances giving the buyer reason to know

⁹³ Ohio Rev. Code § 1302.78(B) (UCC § 2-704(2)). Compare this subsection with Ohio Rev. Code § 1315.65 (Uniform Sales Act § 64(4)).

⁹⁴ See Comment 1 to UCC § 2-704 (Ohio Rev. Code § 1302.78) and § 1302.83 (UCC § 2-709) on action for the price, particularly Ohio Rev. Code § 1302.83(A)(2) (UCC § 2-709(1)(b)). And on the seller's remedy through resale see Ohio Rev. Code § 1302.80 (UCC § 2-706).

⁹⁵ Ohio Rev. Code § 1302.71 (UCC § 2-613).

⁹⁶ Ohio Rev. Code § 1315.09.

⁹⁷ Comment 2 to UCC § 2-613.

that his seller does not claim title in himself or that he is "purporting to sell only such right or title as he or a third person may have," there is in a contract of sale a warranty that the title is good and its transfer rightful, and that the goods will be delivered free of security interests, liens or encumbrances of which the buyer has no actual knowledge at the time of contracting.⁹⁸ Nothing is stated concerning a warranty of quiet possession, and this has been abolished.⁹⁹ There is actually no need for it. There is a new provision by which a merchant who regularly deals in goods of the kind warrants that the goods shall be delivered free of the rightful claim of third persons by way of infringement "or the like" but that a buyer who furnishes specifications to the seller must hold the seller harmless against claims arising out of compliance with the specifications.¹⁰⁰ A later section provides that a cause of action accrues when a breach occurs and, in warranty of title, the breach occurs when tender of delivery is made.¹⁰¹

As in the Uniform Sales Act, express warranties may be created by affirmations of fact or promises made by the seller relating to the goods and becoming a part of the basis of the bargain. A description of the goods which is so made is, under this new Code, an express warranty, rather than an implied one as it is under the Uniform Sales Act.¹⁰² Also, if a sample or model is made part of the basis of the bargain, this creates an express warranty "that the whole of the goods shall conform to the sample or model."¹⁰³ If both descriptive terms and a sample or model are used and they do not jibe, then exact or technical specifications take precedence over the sample or model or general descriptive language, and a sample from an existing bulk "displaces" inconsistent general descriptive language.¹⁰⁴ However, warranties, whether express or implied, are to be construed, wherever possible, to be consistent with each other and as cumulative.¹⁰⁵ The new Code has made it clear that to create an express warranty no formal words such as "warrant" or "guarantee" need be used and that there need be no specific intent to make a warranty, some of the early cases making intent a requirement.¹⁰⁶

⁹⁸ Ohio Rev. Code § 1302.25(A) and (B) (UCC § 2-312(1) and (2)).

⁹⁹ Comment 1, UCC § 2-312.

¹⁰⁰ Ohio Rev. Code § 1302.25(C) (UCC § 2-312(3)).

¹⁰¹ Ohio Rev. Code § 1302.98(B) (UCC § 2-725) and Comment 2 to UCC § 2-312. There is a 4-year statute of limitations for breach of any contract of sale. Ohio Rev. Code § 1302.98(A) (UCC § 2-725(1)).

¹⁰² Ohio Rev. Code § 1302.26(A)(2) (UCC § 2-313(1)(b)). See Uniform Sales Act § 14 (Ohio Rev. Code § 1315.15).

¹⁰³ Ohio Rev. Code § 1302.26(A)(3) (UCC § 2-313(1)(c)).

¹⁰⁴ Ohio Rev. Code § 1302.30(A) and (B) (UCC § 2-317(a) and (b)).

¹⁰⁵ *Ibid.*

¹⁰⁶ Ohio Rev. Code § 1302.26(B) (UCC § 2-313(2)).

As a Comment points out: "The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are to be regarded fairly as part of the contract. If the language is used after the closing of the deal (as when the buyer taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order."¹⁰⁷

Implied warranties of merchantability may be excluded or modified, but if they are not, a merchant dealing in goods of the kind sold impliedly warrants their merchantability and this term is, for the first time in a statute, adequately defined.¹⁰⁸ Among other things, the goods must be fit for the ordinary purposes for which such goods are used; they must be adequately "contained, packaged and labeled as the agreement may require"; they must "conform to the promises or affirmations of fact made on the container or label if any." And under this section the serving for value of food or drink, whether to be consumed on the premises or elsewhere, is specifically described as a sale. In some states, this provision will make a definite change in the law. But, in Ohio, the rule has been in effect for a considerable period.

Implied warranties of fitness for a particular purpose are now spelled out in terms of a seller who has *reason to know* at the time of contracting that the buyer has a particular purpose for his purchase and is relying upon the seller's skill and judgment to select or furnish goods suitable for that purpose. It is pointed out that normally such a warranty will arise only when the seller is a merchant with the appropriate skill or judgment, but that non-merchants under particular circumstances may also be involved.¹⁰⁹

On the matter of the necessity for privity to be present in order to create a warranty, the case law generally has been moving away from this requirement, first in the food and drink cases, and now in cases involving other chattels. It has become quite apparent that the tendency has been to emphasize factors such as affirmations of fact on labels or in descriptive materials accompanying the article or because of advertising, national or otherwise, aimed at the ultimate consumer, and thus reach the conclusion that privity is not necessary.¹¹⁰

¹⁰⁷ Comment 7 to UCC § 2-313.

¹⁰⁸ Ohio Rev. Code § 1302.27 (UCC § 2-314). There was much confusion as to the meaning of "merchantability" in the case law in many states.

¹⁰⁹ Comment 4, UCC § 2-315 (Ohio Rev. Code § 1302.28).

¹¹⁰ *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959), applying Kansas law. But see *Arfons v. E. I. Du Pont de Nemours & Co., Inc.*, 261 F.2d 434 (2d Cir. 1958), applying Ohio law; *Mannsz v. Macwhyte Co.*, 155 F.2d 445 (3rd Cir. 1946),

This is simply carrying over into the warranty area the philosophy in the tort area explained in the great case of *MacPherson v. Buick Motor Co.*¹¹¹ There is nothing in the new Code which will discourage this distinct advance and there is one provision that will aid it materially. By a specific provision, a seller's warranty, whether it be an express or implied one, "extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."¹¹² Thus, the unfortunately decided case of *Welsh v. Ledyard, d.b.a. Western Auto Stores*¹¹³ should not happen again, at least under this new Code.

Apart from the prohibition against excluding or limiting the operation of the section discussed in the paragraph immediately above, warranties may be excluded by contracting for a chattel "as is" or "with all faults" or by other language calling attention to the disclaimer of warranties and making it clear that there are to be no implied warranties. Special circumstances, however, may indicate otherwise. Furthermore, if the buyer, before contracting, has examined the goods, sample or model as fully as he desired or has refused to examine them, there is no implied warranty as to defects which his inspec-

applying Pennsylvania law; *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 695, 288 N.W. 309 (1939); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958), annotated in 75 A.L.R.2d 112 and noted in 19 Ohio St. L.J. 733 (1958) and 9 W.R.L. Rev. 360 (1958) and 10 W.R.L. Rev. 436 (1959); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932); *Burgess v. Montgomery Ward & Co., Inc.*, 264 F.2d 495 (10th Cir. 1959), applying Kansas law; *Alexander v. Inland Steel Co.*, 263 F.2d 314 (8th Cir. 1958), on Kansas law particularly; *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959), applying California law.

¹¹¹ 217 N.Y. 382, 111 N.E. 1050 (1916).

¹¹² Ohio Rev. Code § 1302.31 (UCC § 2-318).

¹¹³ 167 Ohio St. 57, 146 N.E.2d 299 (1957), Bell and Matthias, JJ., dissenting without opinion, noted in 19 Ohio St. L.J. 134 (1958). Here, an electric cooker purchased from the defendant by plaintiff's husband exploded and injured the plaintiff while she was using it. The court held that there was no such privity between the retailer and the buyer's wife as would permit her to recover upon an implied warranty. Compare this case with *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), particularly pp. 83-84 in 161 A.2d, on the matter of privity. The court struck down the common law requirement of privity in these final words: "[W]e hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial." In accord is *State Farm Mutual Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W.2d 449 (Iowa 1961).

tion ought to have revealed to him. And, of course, an implied warranty may be excluded or modified by a course of dealing, performance or usage of trade.¹¹⁴

To disclaim or modify specifically an implied warranty of merchantability, however, mention must be made of merchantability and if in a writing, it must be "conspicuous."¹¹⁵ This is a new provision and a useful one for the protection of the unwary buyer. "Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'¹¹⁶ This subsection makes it clear that what is stated in the paragraph immediately above this one will have the desired effect of excluding implied warranties of merchantability without being more specific.

As to remedies for breach of warranty, they may be limited in accordance with provisions contained in the Code and on contractual modification of remedies.¹¹⁷

PERFORMANCE

While, in every case, the contract of sale is the basic agreement toward which performance must be directed, a sale "consists in the passing of title from the seller to the buyer for a price," a present sale being accomplished by the making of the contract.¹¹⁸ And the obvious is stated by a short section reading: "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract."¹¹⁹

Tender of delivery by the seller involves placing and holding conforming goods at the disposition of the buyer, giving him any notice reasonably necessary to enable him to take delivery, tendering at a reasonable hour, holding the goods for the time reasonably necessary to enable the buyer to take possession, the buyer to furnish the facilities to receive the goods unless otherwise agreed.¹²⁰ If the seller is to ship the goods, provisions are made for their shipment, for the making of a reasonable contract for their transportation, for obtaining and making promptly available any documents necessary for the buyer to obtain possession, and for prompt notice to the buyer of the ship-

¹¹⁴ Ohio Rev. Code § 1302.29(C)(1) and (2) (UCC § 2-316(3)(a) and (b)).

¹¹⁵ "Conspicuous" is defined in Ohio Rev. Code § 1301.01(J) (UCC § 1-201 (10)).

¹¹⁶ Ohio Rev. Code § 1302.29(B) (UCC § 2-316(2)).

¹¹⁷ Ohio Rev. Code § 1302.29(D) (UCC § 2-316(4)). See Ohio Rev. Code §§ 1302.92 and 1302.93 and (UCC §§ 2-718 and 2-719). Modification is covered by Ohio Rev. Code § 1302.12 (UCC § 2-209).

¹¹⁸ Ohio Rev. Code § 1302.01(A)(11) (UCC § 2-106(1)).

¹¹⁹ Ohio Rev. Code § 1302.14 (UCC § 2-301).

¹²⁰ Ohio Rev. Code § 1302.47(A)(1) and (2) (UCC § 2-503(1) and (2)).

ment.¹²¹ If the goods are in the possession of a bailee and are to be delivered without being moved, tender of a negotiable document of title suffices, or the procurement of the bailee's acknowledgment of the buyer's right to possession. The tender of a non-negotiable document of title or written direction to the bailee to deliver will suffice unless the buyer "seasonably" objects, "and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons."¹²² But the same subsection states that "risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender."

Where the seller by contract is to tender documents these must be in correct form, and tender through customary banking channels is sufficient, the dishonor of an accompanying draft constituting non-acceptance or rejection.¹²³ Where there has been no agreement for credit, the seller, by taking negotiable bills of lading in his own name "or otherwise," thereby reserves a security interest in the goods, and he can do the same in case of non-negotiable bills of lading, but in this latter case he reserves *possession* of the goods as security. But if he takes a non-negotiable bill out in the buyer's name as consignee, the seller has reserved no security interest even though he retains the bill of lading, except where he makes a conditional delivery of the bill or of the goods.¹²⁴

If the seller reserves a security interest in violation of his contract, this would constitute an improper contract for transportation under Revised Code section 1302.48 (UCC § 2-504) "but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document."¹²⁵ The rules concerning retention of a security interest do not depend upon the seller's intent to retain only a security interest as they do under the Uniform Sales Act. If he has the intent to retain the whole bundle of rights to goods identified to the contract, he has retained, under this new Code, merely a security interest. And

¹²¹ Ohio Rev. Code § 1302.48 (UCC § 2-504).

¹²² Ohio Rev. Code § 1302.47(D) (UCC § 2-503(4)).

¹²³ Ohio Rev. Code § 1302.47(E) (UCC § 2-503(5)). But see Ohio Rev. Code § 1302.36(B) (UCC § 2-323(2)) for a special provision relating to bills of lading issued in sets of originals.

¹²⁴ Ohio Rev. Code § 1302.49(A)(1) and (2) (UCC § 2-505(1)(a) and (b)). See also Ohio Rev. Code § 1302.51(B) (UCC § 2-507(2)).

¹²⁵ Ohio Rev. Code § 1302.49(B) (UCC § 2-505(2)).

the buyer, by tendering the price, will be entitled to the goods.¹²⁶ One who proceeds upon the lump title concept of the Uniform Sales Act is likely to be confused with this new approach which de-emphasizes title and proceeds upon a step-by-step approach to the problems.

Tender by the seller is a condition to the buyer's duty to accept the goods and to pay for them unless there is an agreement otherwise. And, of course, tender places a duty on the buyer to accept the goods and to pay as provided by the contract.¹²⁷ If the goods have been conditionally delivered to the buyer, his right to keep them and deal with them is conditional on his payment of the price, if the price is due. The seller, if he tenders non-conforming goods and they are rejected, is given the right of curing his tender by supplying conforming goods, provided the time for performance has not expired and he "seasonably" notifies the buyer of his intention to cure the tender and can do this within the time set out in the contract. But in case the seller had reasonable grounds to believe that the buyer would accept non-conforming goods and the buyer rejects, the seller is given a further reasonable time to substitute conforming goods if he seasonably notifies the buyer of his intent.¹²⁸ Under such conditions, it is just, because of the surprise rejection, to permit a later tender of conforming goods.

"Unless otherwise agreed, tender of payment is a condition to the seller's duty to tender and complete delivery."¹²⁹ These conditions are concurrent and anticipate payment and tender at a single time and place. Under this new Code tender of payment need not be in "legal tender" unless the seller demands it; if he does, the buyer must be given an extension of time reasonably sufficient to procure it. Payment is thus authorized "by any means or in any manner current in the ordinary course of business," barring the demand mentioned above. But payment by check is conditional and, as between the parties, is defeated if the check is dishonored when duly presented.¹³⁰ But, as we have seen, another section gives the buyer the power to transfer the goods to a good faith purchaser for value.¹³¹

Proper performance also has an important bearing on the risk of loss problem. Where the contract authorizes the seller to ship by carrier with no duty to deliver at a particular destination and the seller places conforming goods in the carrier's hands, even though the seller has shipped under reservation, the risk of loss is upon the buyer.

¹²⁶ See Comment 1 to UCC § 2-505 (Ohio Rev. Code § 1302.49).

¹²⁷ Ohio Rev. Code § 1302.51 (UCC § 2-507).

¹²⁸ Ohio Rev. Code § 1302.52 (UCC § 2-508).

¹²⁹ Ohio Rev. Code § 1302.55(A) (UCC § 2-511(1)).

¹³⁰ Ohio Rev. Code § 1302.55(B) and (C) (UCC § 2-511(2) and (3)).

¹³¹ Ohio Rev. Code 1302.44(A)(2) (UCC § 2-403(1)(b)).

If the contract requires the seller to deliver the goods at a particular destination, the risk does not pass to the buyer until the goods are there duly tendered while in the possession of the carrier so as to enable the buyer to take delivery.

Risk of loss to goods held by a bailee which are not to be moved under the contract passes to the buyer on his receipt of a negotiable document of title to the goods; or upon the bailee's acknowledgment of the buyer's right to possession; or upon his receipt of a non-negotiable document of title or other written direction to deliver as provided by another section already discussed.¹³²

In cases not within the description contained in the two preceding paragraphs, the risk passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise on tender of delivery. The parties, however, may make contrary agreements concerning risk of loss if they desire.¹³³ A contrary statutory provision is provided for in case of a sale on approval, where the risk is upon the seller after delivery to the buyer until he has accepted the goods.¹³⁴

If there is a breach, this affects the risk in the following ways. Where the seller tenders or delivers goods failing to conform to the contract so as to give the buyer the right to reject, the risk remains in the seller until cure or acceptance by the buyer. And in any case where the buyer *rightfully* revokes acceptance "he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning."¹³⁵ It has already been noted that even when the seller has identified non-conforming goods to the contract, the buyer obtains an insurable interest and a special property in the goods. And the seller, too, has an insurable interest. What may cause confusion in this provision is the clause "effective insurance coverage." This is explained in a Comment as follows:

The word "effective" as applied to insurance coverage in those subsections (UCC § 2-510 (2) and (3)) is used to meet the case of supervening insolvency of the insurer. The 'deficiency' referred to in the text means such deficiency in the insurance coverage as exists without subrogation. This section merely distributes the risk of loss as stated and is not intended to be disturbed by any subrogation of an insurer.¹³⁶

¹³² See Ohio Rev. Code § 1302.47(D) (2) (UCC § 2-503(4)(b)).

¹³³ Ohio Rev. Code § 1302.53(C) and (D) (UCC § 2-509(3) and (4)).

¹³⁴ See Ohio Rev. Code § 1302.40(A) (UCC § 2-327(1)). Generally, as to what constitutes acceptance, see Ohio Rev. Code § 1302.64 (UCC § 2-606).

¹³⁵ Ohio Rev. Code § 1302.54(A) and (B) (UCC § 2-510(1) and (2)). On revocation of acceptance see Ohio Rev. Code § 1302.66 (UCC § 2-608).

¹³⁶ Comment 3, UCC § 2-510 (Ohio Rev. Code § 1302.54).

Subsection (3), referred to in this quotation, applies to a situation where conforming goods have been identified by the seller and the buyer has repudiated or otherwise breached his contract prior to the passing of risk of loss. In such a case this subsection gives a reciprocal right of treating the risk of loss on the buyer for a commercially reasonable time to the extent of any deficiency in the seller's effective insurance coverage. Again, it should be noted that there is no reference at all to where title is. When the problem concerns risk of loss not otherwise covered by the contract, one proceeds to examine the two sections just discussed for a solution.

The buyer's right to inspect the goods prior to payment and acceptance is preserved unless there is an agreement otherwise or the sale is on a C.I.F.,¹³⁷ C.O.D., or payment against documents of title basis when the buyer's right to inspect follows payment. The inspection may be at any reasonable place, time and manner, and when the seller is authorized to send the goods to the buyer, the inspection may be after their arrival. This is the customary point of inspection in such cases. However, if the parties fix a place and method of inspection, this is presumed to be exclusive, "but unless otherwise expressly agreed, it does not postpone identification or shift the place for delivery or for passing of the risk of loss."¹³⁸ This is as it should be since inspection is usually primarily to ascertain whether the goods conform to the contract. While inspection terms are presumed exclusive if the parties fix them, the section provides for the case where compliance becomes impossible. Then, the section provisions concerning inspection are applicable "unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract."¹³⁹ While inspection is normally at the expense of the buyer, if the goods turn out to be non-conforming and are rejected by the buyer, the seller must pay this cost.

There is an interesting new provision inserted for the purpose of preserving evidence of goods in dispute. Either party, in furtherance of the adjustment or claim or dispute, may, on reasonable notice to the other, test and sample the goods including any in the hands of the other party. Furthermore, the parties may agree to a third party inspection to determine the conformity or condition of such goods and

¹³⁷ Sales on C.I.F. and C. & F. terms are spelled out in detail in Ohio Rev. Code §§ 1302.33 to 1302.36 (UCC §§ 2-320 to 2-323). These should be carefully studied as some changes in the common law have been made.

¹³⁸ Ohio Rev. Code § 1302.57, particularly subsection (D) (UCC § 2-513, particularly subsection (4)).

¹³⁹ *Ibid.*

may further agree that the findings shall bind them in any subsequent litigation or adjustment.¹⁴⁰

BREACH, REPUDIATION, AND EXCUSE

While special provisions are made in the Code for breaches in installment contracts and for agreements on contractual limitations of remedy, if these matters are not involved the buyer may reject or accept all of the goods tendered which do not conform to the contract, or he may accept any commercial unit or units and reject the remainder.¹⁴¹ Rejection must be made within a reasonable time after tender or delivery, and seasonable notice must be given the seller to make it effective.¹⁴² If, after rejection, a buyer exercises ownership rights to any commercial unit of the goods, this is wrongful as against the seller. If the buyer, prior to rejection, has taken possession of goods in which he has no security interest¹⁴³ he has the duty after rejection of holding them with reasonable care for the seller for a time sufficiently long to permit the seller to remove them. If the goods are perishables "or threaten to decline in value speedily" and the seller has no agent or place of business in the market where the goods have been rejected, a *merchant buyer* has the duty to follow the seller's reasonable instructions concerning the goods and, absent instructions, to make reasonable efforts to sell the goods for the seller's account. The buyer who thus sells is entitled to reimbursement from the seller or from the proceeds of the sale for expenses reasonably incurred for caring for and selling the goods, and to the usual commission "or if there is none for a reasonable sum not exceeding ten per cent on the gross proceeds."¹⁴⁴ Good faith and good faith alone is the test of the buyer's performance under the provisions requiring him to act affirmatively as described above. And if he is not a merchant buyer, he may reject without further obligations if the rejection is rightful.¹⁴⁵

If the goods are not perishables or of the type that threaten to decline in value speedily, the buyer after rejection who has received

¹⁴⁰ Ohio Rev. Code § 1302.59 (UCC § 2-515).

¹⁴¹ Ohio Rev. Code § 1302.60 (UCC § 2-601). On installment contracts, see Ohio Rev. Code § 1302.70 (UCC § 2-612). Contractual limitations on remedies are covered by Ohio Rev. Code §§ 1302.92 and 1302.93 (UCC §§ 2-718 and 2-719). "Commercial unit" is defined in Ohio Rev. Code § 1302.01(A)(10).

¹⁴² Ohio Rev. Code § 1302.61(A) (UCC § 2-602(1)); (UCC § 2-105(6)).

¹⁴³ Security interest is explained in Ohio Rev. Code § 1302.85, particularly subsection (C) (UCC § 2-711), particularly subsection (3). This subsection gives the buyer protection to the extent of the security interest with authority to sell the goods to satisfy this interest.

¹⁴⁴ Ohio Rev. Code § 1302.62 (UCC § 2-603).

¹⁴⁵ Ohio Rev. Code § 1302.61(B)(3) (UCC § 2-602(2)(c)).

no instructions from his defaulting seller may store the goods for the seller's account, or may reship them to him, or may re-sell for the seller's account with reimbursement as described above. And, to be on the safe side of possible contrary holdings, the section states that such action by the buyer is not acceptance or conversion.¹⁴⁶ But the warning should be given that rejection must be rightful and in accordance with the rules stated concerning the manner of rejection.

The rejecting buyer must also state any particular defect which is discoverable by reasonable inspection or he loses this as a ground justifying rejection or to establish the seller's breach where the seller could have cured it if stated seasonably. As between merchants a seller may, after rejection, make a request in writing asking for a full and final written statement of all defects on which the buyer proposes to rely and his failure to supply such a statement or to state fully the defects precludes him from justifying his rejection or from establishing breach for unstated defects.¹⁴⁷ If the buyer pays without reservation against documents which on their face disclose defects, this precludes recovery of the payment.¹⁴⁸

Acceptance by the buyer occurs when, after opportunity to inspect the goods, he signifies to the seller that the goods are conforming or that he will keep them irrespective of their non-conformity. Or it is an acceptance if he fails to make an effective rejection (as discussed above) after he has had a reasonable opportunity to inspect.¹⁴⁹ An acceptance also occurs when the buyer does any act inconsistent with the seller's ownership, but the act must be ratified by the seller if it is wrongful as against him. And if the buyer accepts a part of any commercial unit, this is an acceptance of that whole unit.¹⁵⁰

Certain well defined legal incidents follow the buyer's acceptance of the goods or documents. He must pay at the contract rate for any goods he has accepted. Thus, acceptance is the normal point at which the price becomes due. It might also be called the "point of no return." Acceptance precludes rejection of the goods accepted and if made with knowledge of their non-conformity the buyer cannot revoke unless he could reasonably assume that the non-conformity would be seasonably cured. However, his acceptance does not "of itself" impair

¹⁴⁶ Ohio Rev. Code § 1302.62(D) (UCC § 2-604).

¹⁴⁷ Ohio Rev. Code § 1302.63(A) (UCC § 2-605(1)).

¹⁴⁸ Ohio Rev. Code § 1302.63(B) (UCC § 2-605(2)).

¹⁴⁹ See *infra*.

¹⁵⁰ Ohio Rev. Code § 1302.64 (UCC § 2-606). On revoking an acceptance of a lot or commercial unit for non-conformity, see Ohio Rev. Code § 1302.66 (UCC § 2-608). The effect of such a revocation is to give the buyer the same rights and duties as if he had rejected the goods.

any other remedy for non-conformity provided by the sales article. But, where a tender of goods has been accepted, the buyer has the duty to notify the seller, within a reasonable time after he discovers or should have discovered a breach, of this fact or be barred from any remedy. And if the claim is one for infringement and the buyer is sued as a result thereof, he has the duty of notifying the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for the liability established by the suit. The statute places the burden on the buyer to establish any breach with respect to goods accepted. And where the buyer is sued for breach of warranty for which his seller is answerable over, written notice is required of the litigation, and if the notice states that the seller may come in and defend and that if he does not he will be bound in any action against him by his buyer, "by any determination of fact common to the two litigations," if he does not come in and defend he will be bound. There are somewhat similar provisions in favor of the seller when the claim is one for infringement and the seller desires to take over the defense of the case.¹⁵¹ These provisions on infringement are new, there being nothing in the Uniform Sales Act comparable to them.

This new Code has a provision for adequate assurance of performance when reasonable grounds for insecurity arise with respect to performance by either party, and not simply because of the insolvency of a party. Written demand must be made upon the party and performance by the demanding party may be suspended "if commercially reasonable" until he receives such assurance, except for any performance for which he has already received the agreed return. And, "after receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."¹⁵² One provision in this section provides that as between merchants the reasonableness of the grounds for insecurity and the adequacy of the assurance offered are to be determined by commercial standards, that is, by merchant "law" rather than lawyer's law. Much of this new Code was drafted on this same basis.

There are specific provisions concerning optional choices an aggrieved party may take upon an anticipatory repudiation or breach.¹⁵³ Opportunity for retraction of an anticipatory repudiation is also given up to the time for his next performance by the repudiating

¹⁵¹ Ohio Rev. Code § 1302.65 (UCC § 2-607).

¹⁵² Ohio Rev. Code § 1302.67, the quoted portion being subsection (D); UCC § 2-609, quoted portion, subsection (4). There is an important Comment following this UCC section.

¹⁵³ Ohio Rev. Code § 1302.68 (UCC § 2-610).

party provided the aggrieved party has not changed his position since the repudiation materially "or otherwise indicated that he considers the repudiation final."¹⁵⁴ The last subsection of this section provides an equitable solution for the reinstatement of the repudiating party's rights by giving the aggrieved party additional time for any delay occasioned by the repudiation.

In case of "installment contracts" which are defined as being those requiring or authorizing the delivery of goods in separate lots to be separately accepted, "even though the contract contains a clause 'each delivery is a separate contract' or its equivalent," the buyer may reject any non-conforming installment if the non-conformity substantially impairs that installment's value and cannot be cured, or if the non-conformity is in required documents. If the non-conformity does not impair substantially the value of the whole contract, and the seller gives adequate assurance of its cure, the buyer must accept that installment.¹⁵⁵ If an installment contract calls for accurate conformity in quality as a condition to the right to acceptance, the contract must necessarily control.¹⁵⁶ If the non-conformity of one or more installments substantially impairs the value of the entire contract, then there is a breach of the whole. "But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect to past installments or demands performance as to future installments."¹⁵⁷

Provisions are made for an equitable determination in case of specific goods (where no substitution is anticipated) which have been destroyed before the risk has passed to the buyer, or in case of a "no arrival, no sale" contract, and this problem has already been mentioned.¹⁵⁸ And substituted performance is provided for in case agreed berthing, loading, type of carrier, etc., become unavailable or when the agreed means or manner of payment fails because of domestic or foreign governmental regulation.¹⁵⁹ And excuse for failure of other presupposed conditions—those anticipated to be present in the performance of the contract but which turn out not to be—is taken care of by a section which delineates the duties and liabilities in such cases.¹⁶⁰

¹⁵⁴ Ohio Rev. Code § 1302.69 (UCC § 2-611).

¹⁵⁵ Ohio Rev. Code § 1302.70 (UCC § 2-612).

¹⁵⁶ See Comment 4 to UCC § 2-612. But the unconscionable contract must always be considered as a possible hurdle.

¹⁵⁷ Ohio Rev. Code § 1302.70(C) (UCC § 2-612(3)).

¹⁵⁸ Ohio Rev. Code § 1302.71 (UCC § 2-613).

¹⁵⁹ Ohio Rev. Code § 1302.72 (UCC § 2-614).

¹⁶⁰ Ohio Rev. Code § 1302.73 (UCC § 2-615). And see Ohio Rev. Code § 1302.74 (UCC § 2-616) referring to the procedure on notice claiming excuse.

REMEDIES

As a broad statement safeguarding remedies for breach of obligations or promises collateral or ancillary to a contract of sale, the first section of part 7 of the Code on remedies states that these are not impaired by the provisions of this article.¹⁶¹

Insolvency of the buyer justifies the seller in demanding cash for future deliveries and for moneys not paid on prior deliveries, the latter going further than is thought possible at common law or under the Uniform Sales Act.¹⁶² The right of stoppage in transit is another possibility when goods are in the process of carriage to the buyer, and a new provision gives the seller the right to stop goods in the hands of other bailees when he discovers the buyer is insolvent.¹⁶³ The provision on stoppage permits also this right "if for any other reason the seller has a right to withhold or reclaim the goods," which, of course, goes beyond what the Uniform Sales Act permits.

In another connection, the right of the seller who has sold goods on credit and delivered them to the buyer to reclaim the goods upon demand made within ten days after their receipt upon discovery of the buyer's insolvency has been mentioned. And if the buyer has misrepresented his solvency to the particular seller in writing within three months before delivery, the ten day limitation does not apply. The section makes clear that, except as provided in this subsection, the seller may not reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.¹⁶⁴ Buyers in ordinary course from the fraudulent vendee, good faith purchasers and lien creditors are protected.¹⁶⁵ And a reclamation under this section excludes all other remedies with respect to the goods. Would this mean that if the goods are injured no claim may be made for this? The language in the section and that in the Comment to it are broad enough to call for an affirmative answer.¹⁶⁶

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole of his contract, an index of remedies is listed in Revised Code section 1302.77 (UCC § 2-703) and succeeding sections state specifically what the seller may do. Some of the more important rights of the seller are these: He may identify to the contract any conforming finished goods and use reasonable

¹⁶¹ Ohio Rev. Code § 1302.75 (UCC § 2-701).

¹⁶² Ohio Rev. Code § 1302.76(A) (UCC § 2-702(1)).

¹⁶³ Ohio Rev. Code § 1302.79(A) (UCC § 2-705(1)).

¹⁶⁴ Ohio Rev. Code § 1302.76(B) (UCC § 2-702(2)).

¹⁶⁵ See Ohio Rev. Code § 1302.44 (UCC § 2-403).

¹⁶⁶ Ohio Rev. Code § 1302.76(C) (UCC § 2-702(3)) and Comment 3.

judgment as to whether he will complete unfinished goods and identify them to the contract. By doing this, he makes available such goods "for resale under the resale section, the seller's primary remedy, and in the special case in which resale is not practicable, [the section] allows the action for the price which would then be necessary to give the seller the value of his contract."¹⁶⁷ Besides the discussion above concerning the extension of stoppage in transit rights, it should also be noticed that when the seller attempts to stop goods upon which a negotiable document of title is outstanding, the bailee is not obliged to obey the notification "until surrender of the document," and thus enjoining its future negotiation as a possibility is gone. Also, where a non-negotiable bill of lading is involved, the carrier is not obliged to obey a notification coming from any person other than the consignor.¹⁶⁸

Where the seller takes advantage of his right to resell the goods, if he makes the sale in good faith "and in a commercially reasonable manner," he may recover the difference between the resale price and the contract price with any incidental damages such as reasonable charges, expenses or commissions incurred in connection with a resale of the goods or otherwise resulting from the breach.¹⁶⁹ But any expenses saved in consequence of the breach must be deducted. Provision is made for either private or public sale with considerable leeway as to whether the sale is by unit or in parcels, and upon terms which are commercially reasonable. "The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach."¹⁷⁰ This reaffirms the provisions discussed above concerning identification after anticipatory breach and gives the seller the opportunity to fix his damages by contracting to resell the quantity of conforming future goods affected by the repudiation. Special provisions are made in case the resale is at public sale, that is, by auction.¹⁷¹ Good faith purchasers, however, are protected even though the seller failed to comply with the requirements laid down by the section. And in such a sale, the seller does not have to account to the buyer for any profit made on the resale.

¹⁶⁷ Comment 1 to UCC § 2-704 (Ohio Rev. Code § 1302.78). See Ohio Rev. Code § 1302.83(A)(2) (UCC § 2-709(1)(b)), on action for the price.

¹⁶⁸ Ohio Rev. Code § 1302.79(C)(4) and (5) (UCC § 2-705(3)(c) and d)) on seller's stoppage of delivery in transit or otherwise.

¹⁶⁹ Ohio Rev. Code § 1302.80(A) (UCC § 2-706(1)); and Ohio Rev. Code § 1302.84 (UCC § 2-710).

¹⁷⁰ Ohio Rev. Code § 1302.80(B) (UCC § 2-706(2)).

¹⁷¹ See, for these special provisions, Ohio Rev. Code § 1302.80(D) (UCC § 2-706(4)).

Suit for the price may be maintained by the seller when it is not paid when due. For goods accepted by the buyer, the price is due upon acceptance unless other arrangements have been made. And where the risk has passed to conforming goods which are lost or damaged "within a commercially reasonable time after risk of their loss has passed to the buyer," the price may be recovered. The payment of the price does not, however, depend upon title in the buyer. Then, too, where goods have been identified to the contract, but after reasonable effort to resell them, they cannot be sold for a reasonable price or the indications are that the effort to sell will not result in a sale, the seller may sue for the price. But in case he sues for the price he must hold goods identified to the contract and still in his control for the buyer, but the seller is given permission to resell the goods at any time prior to the collection of the judgment, and payment of the judgment entitles the buyer to goods not resold. The proceeds of any goods thus sold must be credited to the buyer on the judgment.¹⁷² Incidental damages may also be added to the price.¹⁷³

Where the seller fails to make delivery or repudiates, the buyer may "cancel" and whether he does this or not, he may recover any part of the price he has paid and in addition "cover" and recover damages which may have resulted from the cost of cover, together with incidental damages, less expenses saved (if any) in consequence of the seller's breach; or he may recover damages for non-delivery.¹⁷⁴ The buyer may also recover the goods under the ten-day provision of the Ohio Revised Code section 1302.46 (UCC § 2-502) in case of the seller's insolvency, and in a proper case may have specific performance or replevy under Revised Code section 1302.90 (UCC § 2-716), already discussed.¹⁷⁵ The buyer also has a right of resale on a rightful rejection or a justified revocation of acceptance of goods in which he has a security interest for expenses incurred in their inspection, receipt, transportation, care and custody.¹⁷⁶

Where the buyer has accepted goods and given proper notice of the non-conformity of the goods, he may recover as damages for non-conformity or tender the loss resulting in ordinary course of events because of the breach. In case of breach of warranty, the

¹⁷² Ohio Rev. Code § 1302.83 (UCC § 2-709).

¹⁷³ Under Ohio Rev. Code § 1302.84 (UCC § 2-710).

¹⁷⁴ Ohio Rev. Code § 1302.85(A)(1) and (2) and Ohio Rev. Code §§ 1302.86 and 1302.87 (UCC § 2-711(1)(a) and (b)) and §§ 2-712 and 2-713. "Cover" involves "making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller."

¹⁷⁵ See *infra*.

¹⁷⁶ Ohio Rev. Code § 1302.85(C) (UCC § 2-711(3)).

measure of damages is, "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." Incidental damages may also be recovered and these may include injury to person or property proximately resulting from breach of warranty.¹⁷⁷ The confusion caused by the provision for election of remedies for breach of warranty, and some very unfortunate holdings resulting from the doctrine that the election of one of four options bars a remedy under another under the Uniform Sales Act will be avoided by this simple, direct statement of the remedy in these two sections of the new Code.

Provisions are made for reasonable agreements for liquidation of damages,

but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.¹⁷⁸

Provisions are made in the same section for restitution and rules laid down which should not be difficult to apply.¹⁷⁹

There may be contractual modification or limitation of remedies by provisions for additional remedies or substitution for those provided in the sales article and for limiting or altering the measure of damages recoverable under the article, "as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts."¹⁸⁰ As to modification of consequential damages, they may be limited or excluded unless unconscionable, and limitation of such damages "for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."¹⁸¹

Remedies for material misrepresentation or fraud include all those provided for in this article for non-fraudulent breach. And "Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy."¹⁸²

¹⁷⁷ Ohio Rev. Code § 1302.88 (UCC § 2-714). On incidental and consequential damages, Ohio Rev. Code § 1302.89 (UCC § 2-715).

¹⁷⁸ Ohio Rev. Code § 1302.92(A) (UCC § 2-718(1)).

¹⁷⁹ In Ohio Rev. Code § 1302.92(B), (C) and (D) (UCC § 2-718(2), (3) and (4)).

¹⁸⁰ Ohio Rev. Code § 1302.93(A) (UCC § 2-719(1)).

¹⁸¹ Ohio Rev. Code § 1302.93(C) (UCC § 2-719(3)).

¹⁸² Ohio Rev. Code § 1302.95 (UCC § 2-721).

Tortious injury by a third party to goods gives a right of action to either party to the sale who has title to or a security interest or a special property or an insurable interest in the goods. And if goods have been converted or destroyed a right of action is also in the party who bore the risk or has since assumed the risk as against the other.¹⁸³ The same section provides for the equitable handling of suit by one party where the other party is entitled to all or a part of the recovery.

There is a section outlining the use of proof of market price as to time and place and one on the admissibility of market quotations.¹⁸⁴ These we shall pass without reviewing.

STATUTE OF LIMITATIONS

The last section in the sales article contains a statute of limitations for actions upon contracts of sale. An action for breach must be commenced within four years after the cause of action accrued, but by their original contract, the parties may reduce the period of limitation to not less than one year, but may not extend it. The cause of action accrues when the breach occurs, whether the aggrieved party knows of it or not. A breach of warranty takes place when tender of delivery is made, except where a warranty explicitly extends to future performance of the goods. Then the breach occurs when it is or ought to have been discovered, and this will have to await the time of performance.¹⁸⁵ The law of tolling the statute of limitations is not altered by this section and the section does not apply to causes of action accruing prior to the effective date of this new Code.

¹⁸³ Ohio Rev. Code § 1302.96 (UCC § 2-722).

¹⁸⁴ Ohio Rev. Code § 1302.97 (UCC §§ 2-723, 2-724).

¹⁸⁵ Ohio Rev. Code § 1302.98(A) and (B) (UCC § 2-725(1) and (2)). Ohio Rev. Code § 1302.98(C) refers to a special situation which gives a six-month's extension if the first cause of action is started within the four-year period and terminated by action other than voluntary discontinuance or neglect to prosecute.